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A NEW LOOK AT NEO-LIBERAL ECONOMIC POLICIES AND THE CRIMINALIZATION OF UNDOCUMENTED MIGRATION

*Teresa A. Miller**

IN recent years, Americans' concerns about undocumented migration have snowballed into a full-blown crisis. Immigration is consistently ranked among the top three issues identified as the most important problems facing the country. A recent CBS News Poll found that 61% of Americans believe that undocumented migration is a "very serious problem."¹ Indeed, public opinion about undocumented migration has plummeted as the presence of so-called "illegal aliens" is increasingly linked to a broad range of societal woes, including high taxes, crime, urban street gangs, terrorism, economic malaise, and the deterioration of the rule of law. 70% of Americans believe the undocumented population weakens the economy by using public services.²

The response to this "crisis" has been overwhelmingly harsh and punitive. In the wake of the 109th Congress's failure to enact comprehensive immigration reform, under which both border enforcement and legalization provisions were pending, state and municipal legislatures have been working overtime to fashion a patchwork quilt of enforcement-centered measures responding to the "crisis of illegal immigration." According to the National Conference of State Legislatures, there were 1560 pieces of immigration-related legislation considered in statehouses nationwide in 2007.³ State lawmakers wound up passing at least 244 new laws in 46

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1. Julia Preston & Majorie Connelly, *Immigration Bill Provisions Gain Wide Support in Poll*, N.Y. TIMES, May 25, 2007, at A1.

2. *Id.*

3. NAT'L CONF. STATE LEGIS., IMMIGRANT POLICY PROJECT, 2007 ENACTED STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION 1 (Nov. 29, 2007), <http://www.ncsl.org/print/immig/2007Immigrationfinal.pdf>.

states, tripling the number of immigration bills passed in 2006.⁴

Municipalities have similarly enacted a flurry of enforcement-centered ordinances aimed at punishing undocumented immigrants. The notorious ordinance passed by City of Hazelton, Pennsylvania stands out as among the harshest. Endeavoring to make their city “one of the most difficult places in the United States for illegal immigrants,”⁵ the Hazelton City Council passed an ordinance prohibiting “illegal aliens” from leasing or renting property and subjecting anyone who allows an illegal alien to use, rent, or lease their property to a fine of \$1,000 per rental day.⁶ The ordinance further provided for the suspension of the business license of any employer of “illegal aliens” for either 5 or 10 years, and deemed English to be Hazelton’s official language.⁷ Although the ordinance was subsequently struck down by a federal district court,⁸ at least a dozen municipalities followed Hazelton’s lead.⁹

Yet the resort of some states to enhanced punitiveness toward undocumented immigrants, the businesses that employ them, and the people who provide services to them was by no means inevitable. Several alternative approaches could have been taken. Congress could have passed comprehensive immigration reform demarcating a path to citizenship for undocumented immigrants while simultaneously enforcing immigration restrictions at the border. Or, as Kevin R. Johnson insightfully posits in his *Open Borders?* article, Congress could have provided for people to move freely across its land borders just as the North American Free Trade Agreement (“NAFTA”) provided for the free trade of goods and services.¹⁰ Moreover, the call for harsher and more punitive border enforcement has displaced important economic and foreign policy initiatives

4. *Id.* at 1. For example, in mid-2007, Arizona passed a bill requiring employers to verify the legal status of their employees, or risk having their business licenses suspended. This legislation further provided for permanent revocation of the business’s state license, in case of a second offense, thereby preventing the business from operating anywhere in the state. ARIZ. REV. STAT. ANN. § 23-212 (Supp. 2007). A few months later, Oklahoma passed a bill that denies public benefits to undocumented migrants within its borders (except in cases of medical emergencies or emergency aid), creates criminal penalties for knowingly aiding illegal immigrants, permits local police to enforce federal, civil immigration laws, and requires businesses to screen workers through a federal verification system or risk penalties. Oklahoma Taxpayers & Citizen Protection Act of 2007, 2007 Okla. Sess. Law Serv. Ch. 112 (H.B. 1804) (West); *see also* Julia Preston, *States Take Up Immigration Issue*, N.Y. TIMES, Nov. 30, 2007, at A1.

5. Julia Preston, *Pennsylvania Town Delays Enforcing Tough Immigration Law*, N.Y. TIMES, Sept. 2, 2006, at A11.

6. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 484–85 (M.D. Pa. 2007).

7. *Id.*; *see also* Hazelton, Pa., Ordinance 2006-10, § 2(A) (July 13, 2006), available at <http://clearinghouse.wustl.edu/chDocs/public/IM-PA-0001-0003.pdf>; Jason Englund, Note, *Small Town Defenders or Constitutional Foes: Does the Hazelton, PA Anti-Illegal Immigration Ordinance Encroach on Federal Power?*, 87 B.U. L. REV. 883 (2007).

8. *Lozano*, 496 F. Supp. 2d at 518–33.

9. *See, e.g.*, Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES Sept. 26, 2007, at A1 (listing Riverside, NJ, Farmers Branch, TX, and Valley Park, MO, as towns which followed Hazelton’s example).

10. Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 213–63 (2003).

aimed at strengthening Mexico's economy and reducing the exodus of Mexican workers across the Southwest Border.

A few years ago, I wrote my first article about immigration reform, in which I sought to understand the influence of harsh, "tough on crime," War-on-Drugs era, crime control policies on the immigration system. The article suggested that the new detention- and removal-centered approach to the dispensation of non-US citizens with past criminal convictions¹¹ (so-called "criminal aliens") directly reflected a transformation within the criminal justice system known as "penal severity," resulting in a convergence of immigration control and crime control policies.¹² Linking penal severity to the harsh reforms enacted in the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA")¹³ and the Anti-Terrorism and Effective Death Penalty Act ("AEDPA")¹⁴ explained a great deal about the criminalization of lawful permanent residents with past criminal convictions, many of whom have been living legally in the United States for many years. However, linking "penal severity" to recent, criminally punitive state legislation did not adequately explain the enforcement-centered offensive against undocumented migrants: non-citizens with distinct cultural ties to Mexico and Latin America, who are uniformly poor and who cross the border for a range of reasons, including employment and social welfare benefits.

In this Essay, I would like to look at the neo-liberal policies¹⁵ of the

11. These immigrants are commonly referred to as "criminal aliens."

12. Teresa A. Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003).

13. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

14. Pub. L. No. 104-132, 110 Stat 1214 (1996).

15. Liberalism is an ideology focusing on limited government by free, rational individuals. Its roots date back to the Enlightenment. Over the centuries, differing strains of liberal theory have emerged, subjecting the meaning of liberalism to challenge and contestation. It is generally agreed that "classical liberalism" elevates the values of individual freedom, limited government, and free markets consistent with the writings of Adam Smith, John Stuart Mill, Thomas Paine, and others. These ideas are a blend of economic and political liberalism, conceiving of free markets as maximizing benefit to society, and imagining government's authority as derived from autonomous public citizens.

Yet these ideas differ dramatically from the liberalism of the 19th and 20th Centuries. This latter variation, also referred to as the "new liberalism," is associated with Franklin D. Roosevelt's New Deal policies, which accommodated far more government intervention into the economy in order to benefit society. The term "classical liberalism" was coined in order to distinguish the "new liberalism" of the 19th and 20th Centuries from the liberalism of the early 19th Century. Indeed in the context of the "new liberalism," classical liberalism resonates with trends within 20th Century conservatism, namely social conservatism, religious conservatism, and libertarianism. Included in these ideologies are the defense of traditional social norms and values (for example, opposing same-sex marriage and abortion), support of states' rights, limited government, and markets unfettered by government regulation. Although they come to it from different means historically, classic liberals and modern conservatives share a belief in free markets. In direct opposition to the welfare state, modern conservatives elevated the "conservative opportunity society."

Neo-liberalism (an abbreviation of "neo-classical liberalism") refers to the late 20th Century reemergence of economic liberalism's influence among economic scholars and policymakers. Neo-liberalism resembles modern conservatism in that it champions the virtue of free markets. Not surprisingly, neo-liberalism has been described as a throwback to the economic policies of 18th and 19th century classical liberalism. Alejandro Portes, *Neo-lib-*

Ronald Reagan and Margaret Thatcher era—deregulating markets, downsizing government by eliminating social welfare subsidies, championing self-reliance over community, and privileging private ownership—and their global effects as a possible cause of the criminalization of undocumented migration that has occurred in the United States over the past twenty years. In exploring this relationship, I will first look at neo-liberal globalization, its influence, and effects. Second, I will link neo-liberal economic policy to penal severity, an earlier domestic variant of the same policies. Finally, I will demonstrate that undocumented immigrants uniquely stand at the nexus of two distinct criminalization movements.

I. NEO-LIBERAL GLOBALIZATION

A critical factor in reshaping the social and economic landscape of the United States is the rise of neo-liberal globalization—the elevation of neo-liberal economic policies and political decisionmaking on the world stage. It is not enough to refer to globalization, for globalization is not a new phenomenon. For thousands of years people, and later merchants, have traded from great distances.¹⁶ However, neo-liberal globalization characterizes the economic reforms instituted in the 1980s, largely in response to the economic downturn and international debt crises of the previous decade.¹⁷ These reforms prioritized competitive free market capitalism, private ownership, “free trade,” export-led growth, strict controls on balance of payments and deficits, and drastic reduction of government spending, social welfare spending in particular.¹⁸ No longer confined to the domestic economic policy within the United States and Great Britain, Reagan and Thatcher’s post-New Deal economic reforms were projected onto the international arena. The commitment of wealthy capitalist countries to “downsizing government,” privatizing state indus-

eralism and the Sociology of Development: Emerging Trends and Unanticipated Facts, 23 POPULATION & DEV. REV., 1997 no.2, at 229. See also, Martha T. McCluskey, *Subsidized Lives and the Ideology of Efficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 115, 115 n.2 (1999) (citing DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS* 15-16 (1998) (favorably presenting this new “liberalism” as a reassertion of nineteenth-century ideas about the primacy of the market and the importance of property rights)).

The governments led by Ronald Reagan in the United States and Margaret Thatcher in the United Kingdom are considered textbook examples of neo-liberal regimes due to their commitment to deregulating markets and liberalizing their respective economies. Reagan’s decertification of the Air Traffic Controllers union in 1981 and slashing of tax burdens on the wealthy were milestones in economic reforms of the day, as was Thatcher’s privatization of many of Britain’s state-run utilities and her successful campaign to reduce the influence of Britain’s trade unions. Although the influence of neo-liberalism can be discerned in the economic platforms of late 20th Century conservatives such as Reagan, Thatcher, and Newt Gingrich, its influence was felt more broadly on the international stage in the form of trade policies eliminating tariffs and other barriers to free trade, and prioritizing drastic reductions in government social spending.

16. See generally JARED DIAMOND, *GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES* (1997).

17. See NOAM CHOMSKY, *PROFIT OVER THE PEOPLE: NEOLIBERALISM AND GLOBAL ORDER* 7-19 (1998).

18. *Id.*

tries, and allowing markets to operate free from state intervention led them—and eventually the international financial institutions which they influenced—to condition international aid to developing countries upon the willingness of debtor nations to make structural adjustments to their economic and social policies consistent with the neo-liberal agenda.¹⁹

The impact of neo-liberal globalization is deeply controversial. Proponents tout its potential for decreasing poverty by permitting developing countries and their citizens to compete in an export-focused global marketplace, develop economically, and raise their standard of living.²⁰ Critics point out that an unfettered international free market has benefited multinational corporations in wealthy countries at the expense of the small businesses, cultures, and citizenry of developing countries.²¹ The drawbacks are not limited, however, to developing countries. The United States' success in negotiating dramatic reductions in barriers to commerce and entering into "free trade" agreements with less developed countries resulted in the loss of American jobs as American corporations constructed foreign factories, established production and marketing arrangements with foreign partners, closed down their domestic manufacturing operations, and sent jobs once filled by American blue-collar factory workers across the border.²²

In the midst of American deindustrialization and job losses to manufacturing enterprises on foreign soil in the late 1980s and early 1990s, NAFTA—the North American expression of neo-liberal globalization—was signed in 1992 after several years of negotiations between Canada, the United States, and Mexico.²³ NAFTA was marketed to the American public as the vehicle by which the U.S. would succeed in the global marketplace.²⁴ NAFTA, President Clinton and corporate leaders claimed, would create new, better-paying jobs for Americans and virtually eliminate illegal immigration across the Southwest Border by creating sustained economic prosperity in Mexico.²⁵ NAFTA furnished a blueprint for a deregulated "free market" stretching from the Arctic Circle to Chiapas in which goods would be traded free of tariffs and taxes, governmental intervention into the economy would be limited, growth would be export-driven, and governmental spending on social welfare would be

19. *Id.*

20. See, e.g., SEBASTIAN EDWARDS, *CRISIS AND REFORM IN LATIN AMERICA: FROM DESPAIR TO HOPE* (1995).

21. See, e.g., DUNCAN GREEN, *SILENT REVOLUTION: THE RISE OF MARKET ECONOMICS IN LATIN AMERICA* (2d ed. 2003).

22. See, e.g., Timothy Egan, *At Boeing, A War Over Job Exodus*, N.Y. TIMES, Oct. 14, 1995, at 7.

23. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1997, 32 I.L.M. 289 (1993).

24. JEFF FAUX, *THE GLOBAL CLASS WAR: HOW AMERICA'S BIPARTISAN ELITE LOST OUR FUTURE—AND WHAT IT WILL TAKE TO WIN IT BACK* 31–33 (2006); Keith Bradsher, *Economic Accord Reached by U.S., Mexico, and Canada to Lower Trade Barriers*, N.Y. TIMES, Aug. 13, 1992, at A1.

25. FAUX, *supra* note 24, at 33–34; Robert Hershey, *Pact Called Key to Lower Imports*, N.Y. TIMES, Oct. 17, 1993, § 1 (magazine), at 21.

drastically reduced.²⁶ By allowing goods (and services, like call centers and clothing assembly) to be traded across the border with minimal tariffs and taxes, NAFTA would (as the narrative goes) enhance the United States' economic competitiveness.²⁷ By deregulating trade and thereby facilitating an export boom to Mexico, NAFTA, President Clinton assured the country, would create hundreds of thousands of jobs.²⁸

Neo-liberal or "free market" globalization has severely compromised the economic security of the American worker. As hundreds of thousands of manufacturing jobs that had provided stable, solid income to single-earner households were moved overseas from the late 1980s on, the middle-income sector in the United States began to disappear.²⁹ The result has been growth in highly skilled, high-tech, service-oriented employment, as well as in low-wage, unskilled labor such as residential lawn service, domestic service, building maintenance, and low-level restaurant, hotel, and airport jobs.³⁰

Furthermore, neo-liberal economic policies created social and cultural "baggage." Reagan blamed the individual for failing to thrive, and justified eliminating public support for social welfare by stigmatizing the poor as lazy ("Welfare Queens") or corrupt ("Welfare Cheats"), and therefore undeserving.³¹ "Big government" was associated with misguided attempts to ameliorate social ills, despite the fact that, at the time, the largest subsidies went to the agriculture and defense industries.³² This created several problems. Blue collar workers who lost their jobs when American industries relocated overseas now needed to earn a living wage within the service sector. And low-wage jobs that do not pay a living wage remained open, and needed to be filled. By stigmatizing the welfare dependent as a drag on the economy in an era of global competition, neo-liberal economic policies deflected the blame for loss of working class jobs away from large corporations with a vested commercial interest in outsourcing production to countries where labor costs were cheaper.

Predictably, neo-liberal economic policies created similar distortions in the economies of other countries when they were adopted and applied across North America in the form of NAFTA. Despite politicians' representations that NAFTA would stem the tide of undocumented Mexican migration by creating jobs in Mexico, when NAFTA lowered and slowly phased out tariffs against imported foreign corn, low-tech Mexican farmers were forced to directly compete with high-tech American and Cana-

26. FAUX, *supra* note 24, at 30-34.

27. *Id.*

28. *Id.* at 33.

29. ASHOK DEO BARDHAN & CYNTHIA A. KROLL, FISHER CTR. FOR REAL ESTATE & URBAN ECON., THE NEW WAVE OF OUTSOURCING 1 (Fall 2003), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1025&context=iber/fcreue>.

30. FAUX, *supra* note 24, at 129-32.

31. See, e.g., Steven V. Roberts, *Food Stamps Program: How it Grew and How Reagan Wants to Cut it Back*, N.Y. TIMES, Apr. 4, 1981, § 1 (magazine).

32. FAUX, *supra* note 24, at 61.

dian agribusinesses.³³ Subsidized American corn was exported to Mexico at an average of \$20 per metric ton *below* the cost of production.³⁴ Millions of small farmers in Mexico who depended on the sale of corn for income were dislocated.³⁵ Although they enjoyed communal ownership of their land “in perpetuity” prior to NAFTA,³⁶ President Salinas revoked this provision of the Mexican Constitution as part of the implementing legislation for the treaty.³⁷ Thus hundreds of thousands of small farmers—unable to compete with American and Canadian grain imports that had, in the first year of NAFTA’s implementation, captured one-third of the Mexican grain market³⁸—had their lands seized for debts and headed North to find work as migrant farmers in the United States.³⁹

And while NAFTA did not create American-owned “maquiladora” sweatshops, its “free trade” policies exacerbated the meager wages, congestion, impoverished living conditions, and suffering of Mexican workers lured to the United States-Mexico border by the promise of work.⁴⁰ Maquiladoras were the product of the Border Industrialization Program proposed in 1965 which allowed tariff-free and tax-free imports of materials and components into Mexico for assembly in manufacturing facilities within 12.5 miles of the border and re-export of the finished products to the United States.⁴¹ Maquiladora wages were low, even by Mexican standards, and the conditions in the factories and surrounding areas were squalid and crime-ridden.⁴² Despite confident reassurances by NAFTA proponents that “free trade” would cause the maquiladora industry to disappear, maquiladora employment doubled from 550,000 to over 1.3 million at its peak in 2001.⁴³ Then it fell precipitously when the Mexican economy was opened to competition from even cheaper, Chinese-made products.⁴⁴

This, then, is a different kind of story. Neo-liberal economic policies, of which NAFTA is an example, destroyed certain sectors of *both* the American and Mexican economies, causing anxiety and deep resentment about unemployment in the U.S., and creating pressure in Mexico to

33. John Cavanagh et al., *Happily Ever NAFTA?* 132 FOREIGN POLICY, Sept.-Oct. 2002, at 58; see also OXFAM INTERNATIONAL, DUMPING WITHOUT BORDERS: HOW US AGRICULTURAL POLICIES ARE DESTROYING THE LIVELIHOODS OF MEXICAN CORN FARMERS 9–11 (Aug. 2003), http://www.oxfam.org/en/files/pp030827_corn_dumping.pdf; Elizabeth Becker, *U.S. Corn Subsidies Said to Damage Mexico*, N.Y. TIMES, Aug. 27, 2003, at C4.

34. OXFAM INTERNATIONAL, *supra* note 33, at 12; FAUX, *supra* note 24, at 133. The amount is roughly 25–30% below costs of production.

35. *Id.* at 20.

36. MEX. CONST. art. 27 (amended 1992).

37. FAUX, *supra* note 24, at 135.

38. OXFAM INTERNATIONAL, *supra* note 33, at 16.

39. FAUX, *supra* note 24, at 133–35.

40. *Id.* at 134–35.

41. *Id.* at 135.

42. *Id.*

43. *Id.*

44. Jesus Cañas & Roberto Coronado, Fed. Reserve Bank of Dallas, *Maquiladora Industry: Past, Present and Future*, EL PASO BUS. FRONTIER, 2002 No. 2, at 5.

sneak into the United States for work. Having established the link between neo-liberal economic policies and undocumented Mexican migration across the border, the next step is to discuss the relationship between these economic policies, the undocumented migration they encouraged, and incentives they provide for criminalizing that migration.

II. NEO-LIBERAL ECONOMIC POLICIES ENCOURAGE UNDOCUMENTED MIGRATION

The movement of Mexicans across the Southwest Border of the United States was a predictable outgrowth of neo-liberal economic policies intent upon freeing up markets, but making no provision for the welfare of the people—on *either* side of the border—who would be affected by the policies. When NAFTA passed in the House of Representatives by a narrow vote, vocal critic David Bonier (D-MI) predicted that the bill would benefit large corporations to the detriment of working people.⁴⁵ Bonier's precise words were: "Whose side are we on? Are we on the side of the Fortune 500? Or are we on the side of the unfortunate 500,000 who will lose jobs because of this agreement?"⁴⁶ In a brilliant economic history of NAFTA, Jeff Faux demonstrates in meticulous detail that the treaty represented an "opportunity for the nation's elites to make rules for the [newly emancipated,] post-cold war global economy that would benefit them and their corporate clients."⁴⁷ He claims that the creation of a trade and investment agreement without social standards permitted the governing classes of both developed (Canada and the United States) and developing (Mexico) countries to disconnect themselves from social welfare obligations imposed by their national communities.⁴⁸

Other critics likewise contend that NAFTA spurred economic migration to the United States because it was never designed as a genuine development program that would raise living standards and broadly promote public welfare.⁴⁹ Rather NAFTA, they contend, was a government-sanctioned corporate plunder that benefited elites on both sides of the border.⁵⁰ Regardless of the reason, the result is undeniable. Despite the influx of foreign-owned factories, total manufacturing employment in Mexico declined from a high of 4.1 million in 2000 to 3.5 million by 2004.⁵¹ As the better paying jobs disappeared, "Mexico's average wage for production workers, which was low to begin with, fell even further

45. Kenneth J. Cooper, *House Approves U.S.-Canada-Mexico Trade Pact of 234 to 200 Vote, Giving Clinton Big Victory*, WASH. POST, Nov. 18, 1993, at A1.

46. *Id.*

47. FAUX, *supra* note 24, at 11.

48. *Id.* at 11–12.

49. Tim Weiner et al., *Free Trade Accord at Age 10: The Growing Pains are Clear*, N.Y. TIMES, Dec. 27, 2003, at A1; *see also* Roger Bybee & Carol Winter, *Immigration Flood Unleashed by NAFTA's Disastrous Impact on Mexican Economy*, <http://www.commondreams.org/cgi-bin/print.cgi?file=/Views06/0425-30.htm>.

50. FAUX, *supra* note 24, at 127–54.

51. Louise Uchitelle, *NAFTA Should Have Stopped Illegal Immigration, Right?*, N.Y. TIMES, Feb. 18, 2007, § 4 (magazine).

behind the wage of production workers in the United States.”⁵² Although experts agree that if NAFTA had quickly driven wages up in Mexico, the exodus of Mexican workers across the border would have been muted, no economic miracle was forthcoming.⁵³ Faced with a rapid decline in wages, Mexicans migrated north *en masse*.

In October 1996, the (now defunct) Immigration and Naturalization Service (“INS”) estimated that 5.0 million undocumented immigrants were residing in the United States.⁵⁴ This figure was estimated to be growing by about 275,000/year at the time.⁵⁵ Approximately 3.5 million unauthorized migrants had been living in the United States in 1990.⁵⁶ By 2000, the undocumented population had increased to between 7.0 and 8.0 million, representing an average increase of between 350,000 and 500,000 per year.⁵⁷ By 2004, the estimated population of undocumented migrants living in the US was 10.3 million, an estimated 57% (or 5.9 million) of whom had been born in Mexico.⁵⁸ And as of March 2005, a survey conducted by the Pew Hispanic Center estimated the undocumented population at 11.1 million,⁵⁹ with roughly 6.3 million from Mexico.⁶⁰

This steady exodus of Mexicans directly benefits the United States private sector by providing a continued malleable pool of low-wage workers who possess drastically circumscribed constitutional rights by virtue of their immigration status. From a classic Marxist perspective, these undocumented immigrants constitute part of the lumpenproletariat, the surplus labor that can be tapped and discarded as economic conditions require.⁶¹ One recent example is the role of undocumented workers in the rebuilding of New Orleans. A Post-Katrina study of work conditions in New Orleans revealed that one-quarter of the workers employed to rebuild New Orleans were undocumented immigrants, engaged in more hazardous work, working for less pay, working with less safety equipment, and receiving less medical care than documented workers.⁶² The

52. *Id.*

53. *Id.*

54. U.S. IMMIGR. & NATURALIZATION SERV., ILLEGAL ALIEN RESIDENT POPULATION 1 (Oct. 1996), available at <http://www.dhs.gov/xlibrary/assets/statistics/illegal.pdf>.

55. *Id.*

56. U.S. IMMIGR. & NATURALIZATION SERV., ESTIMATES OF UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990-2000, at 6 (2001), available at http://www.ihs.gov/xlibrary/assets/statistics/publications/IlI_Report_1211.pdf.

57. *Id.* at 6.

58. JENNIFER VAN HOOK, FRANK D. BEAN & JEFFREY PASSEL, MIGRATION POL’Y INST. UNAUTHORIZED MIGRANTS LIVING IN THE UNITED STATES: A MID-DECADE PORTRAIT (Sept. 2005), <http://www.migrationinformation.org/Feature/display.cfm?ID=329>

59. Jeffrey Passel, Pew Hispanic Ctr., Size and Characteristics of the Unauthorized Migrant Population in the US (Mar. 7, 2006), <http://www.pewhispanic.org/reports/report.php?ReportID=61>.

60. Rakesh Kochhar, Pew Hispanic Ctr., Survey of Mexican Migrants; Part Three: The Economic Transition to America (Dec. 6, 2005), <http://pewhispanic.org/reports/report.php?ReportID=58>.

61. KARL MARX, THE EIGHTEENTH BROMAIRE OF LOUIS BONAPARTE (Daniel de Leon trans., Charles H. Kerr & Co. 1907) (1869).

62. LAUREL E. FLETCHER ET AL., REBUILDING AFTER KATRINA: A POPULATION-BASED STUDY OF LABOR AND HUMAN RIGHTS IN NEW ORLEANS (June 2006), <http://www>.

primary country of origin for these workers was Mexico.⁶³ The study concluded that employers were more likely to exploit undocumented workers and evade their obligations to these workers with regard to compensation, safe working conditions, and access to emergency care.⁶⁴ In many other workplace contexts, employers leverage their ability to have undocumented workers arrested, detained, and removed to intimidate them and discourage them from asserting workplace rights—for example, rights to fair compensation, timely compensation, workers' compensation, and emergency medical care—for which those employers would otherwise have to pay.⁶⁵ A further step, the criminalization of undocumented workers living below the radar to avoid apprehension, detention, and deportation, increases their economic exploitation.

III. NEO-LIBERAL TRADE POLICIES FACILITATE THE CRIMINALIZATION OF UNDOCUMENTED MIGRANTS

In addition to encouraging undocumented migration from Mexico, neo-liberal economic policies have facilitated the criminalization of these unauthorized border crossers. Let me first describe what I mean by "criminalization."

In using the word "criminalization" in this context, I am referring to a range of techniques that diverge from past laws and policies by punishing, stigmatizing, and excluding a new group. It is the process by which the new group is converted from its prior status to a criminal status. The first technique is the expansion of formal criminal penalties for acts related to undocumented migration. Stated another way, the conduct we consider to be criminal has expanded to include more conduct related to unauthorized border crossing.

Immigration laws have consistently imposed harsh sanctions on foreign-born persons convicted of crimes or associated with criminal activity in their country of origin. Some of the earliest immigration restrictions targeted the exclusion of criminals.⁶⁶ However, what we have witnessed in the past two decades is a significant expansion of rhetoric linking immigrants who were not criminals in their country of origin to crime in their current country. For example, in 2005, the state of New Hampshire expanded its definition of criminal trespass law to prosecute a Mexican im-

hrcberkeley.org/pdfs/report_Katrina.pdf; Leslie Eaton, *Study Sees Increase in Illegal Hispanic Workers in New Orleans*, N.Y. TIMES, June 8, 2006, at A16.

63. FLETCHER ET AL., *supra* note 62, at 12.

64. *Id.* at 27.

65. MEXICAN AM. LEGAL DEFENSE & EDUC. FUND, USED AND ABUSED: THE TREATMENT OF UNDOCUMENTED VICTIMS OF LABOR LAW VIOLATIONS SINCE HOFFMAN PLASTIC COMPOUNDS V. NLRB (Jan. 2003), <http://www.maldef.org/publications.pdf/Hoffman11403.pdf>.

66. KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 109–14 (2004) (containing a brief and succinct recap of the "anticriminal history" of U.S. Immigration Laws).

migrant who admitted he was in the United States illegally.⁶⁷ While the trial court ultimately dismissed the trespass charge on the ground that New Hampshire had unconstitutionally infringed upon the federal government's power to regulate immigration,⁶⁸ this novel application of common law criminal trespass doctrine represents an attempt to criminalize the physical presence of the undocumented immigrant within the territorial United States.

Furthermore, the categorization of crime has expanded to include many actors whose conduct would not have previously subjected them to criminal penalties. Stated another way, who we consider to be criminals has expanded to persons on the periphery of illegal immigration. For example, Oklahoma recently passed a law—the Oklahoma Taxpayer and Citizen Protection Act of 2007—which is reputed to be the most Draconian anti-immigrant law in the country: it established, inter alia, criminal penalties for harboring, transporting, or concealing illegal immigrants.⁶⁹ Further legislation has been proposed that would allow police to seize and liquidate the property of anyone giving aid and comfort to illegal aliens, much like the forfeiture of assets related to drug offenses.⁷⁰ In addition, in October 2006, the City of Escondido, California, adopted an ordinance that criminalized the provision of housing by landlords to persons known to be undocumented aliens.⁷¹ Penalties included the possibility of six months in jail, as well as a monetary fine of up to \$1000 per violation per day.⁷²

A second technique that punishes, stigmatizes, and excludes undocumented migrants is the increasing degree of cooperation between law enforcement and civil immigration authorities in apprehending and deporting illegal aliens. As civil immigration laws are increasingly enforced in close cooperation with criminal law enforcement agencies and officials, the apprehension and deportation of unauthorized border crossers becomes criminalized. A rapidly growing number of states are enter-

67. In New Hampshire, a person is guilty of criminal trespass if, "knowing that he is not licensed or privileged to do so, he enters or remains in any place." N.H. REV. STAT. ANN. § 635:2 (2007). The New Ipswich sheriff reasoned that if an immigrant was in the country illegally, he was equally in New Ipswich illegally. Pam Belluck, *Novel Tack on Illegal Immigrants: Trespass Charges*, N.Y. TIMES, July 13, 2005, at A14. In other words, the undocumented alien "trespassed according to the plain language of the statute because he knew he had entered and remained in a 'place' (New Ipswich, New Hampshire) that he was not, as an illegal immigrant, 'licensed or privileged' to be." Michael R. Boland, Jr., Comment, *No Trespassing: The States, the Supremacy Clause, and the Use of Criminal Trespass laws to Fight Illegal Immigration*, 111 PENN ST. L. REV. 481, 486–87 (2006).

68. *State v. Barros-Batistele*, No. 05-CR-1474 (N.H. Dist. Ct. Aug. 12, 2005), available at http://www.nh.gov/judiciary/district/criminal_trespass_decision.pdf.

69. Oklahoma Taxpayer and Citizen Protection Act of 2007, *supra* note 4, § 3 (creating OKLA. STAT. ANN. tit. 21, § 446, effective Nov. 1, 2007).

70. Mick Hinton, *Terrill Crafting HB 1804 Spinoff*, TULSA WORLD (Ok.), Nov. 26, 2007, at A1.

71. *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1047–48 (S.D. Cal. 2006).

72. *Id.* Following the entry of a temporary restraining order, the city agreed not to enforce the ordinance. *Garrett v. City of Escondido*, No. 06CV2434JA4 (NLS) (S.D. Cal. Dec. 15, 2006) (Stipulated Final Judgment and Permanent Injunction).

ing into agreements with the Department of Homeland Security pursuant to INA section 287(g), which permits designated law enforcement officers to perform immigration enforcement functions.⁷³ In many states, troopers have the power to interrogate people whom they determine, during the course of criminal investigations, to be illegal immigrants.⁷⁴ The suspects can then be arrested without a warrant on the immigration charge alone.⁷⁵ In some cases, local law enforcement officers are authorized to interview non-US citizens in county correctional facilities to determine whether there is probable cause for an immigration violation and if so, process these prisoners for deportation.⁷⁶ As of September 19, 2007, twenty-eight states have entered into so-called “287(g)” agreements with Immigration and Customs Enforcement (“ICE”).⁷⁷

The irony in the dramatic increase in law enforcement resources being brought to bear on the problem of undocumented migration is the paucity of resources directed toward preventing crimes against illegal aliens. In other words, law enforcement resources directed at undocumented migrants frame them as the perpetrators, the criminals, rather than the victims, despite ample evidence that undocumented immigrants—due to their vulnerable, liminal status—are increasingly the targets of crime—that is, the victims rather than the perpetrator. The FBI recently released statistics showing that hate crimes against Hispanics increased by 35% between 2003 and 2006.⁷⁸ This dramatic increase has been attributed to propaganda and a “rancid atmosphere” surrounding the issue of illegal immigration.⁷⁹

The third technique is a result of the growing infrastructure of technologies traditionally used to punish crime. As recently as ten years ago, non-citizens caught sneaking over the border after previous deportation would be escorted back across the border via expedited removal.⁸⁰ Currently, those immigrants are being charged with crimes, criminally prose-

73. 8 U.S.C. § 1357(g) (2000). These agreements are generally referred to as “memorandum of agreement” (“MOA”).

74. 8 U.S.C. § 1347(g).

75. *Id.* Municipalities that have entered into such agreements with ICE include Collier County, FL; Tulsa, OK; Burlington, MA; Davidson County, TN; Mariposa County, AZ; and 4 counties in North Carolina. U.S. Immigr. & Customs Enforcement, 287(g) Signed MOAs as of 9-19-07: 28 (Aug. 15, 2007), <http://www.ice.gov/partners/287g/Section287g.htm>. See also Nathan G. Cortez, *The Local Dilemma: Preemption and the Role of Federal Standards in State and Local Immigration Laws*, 61 SMU L. REV. 47 (2008); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27.

76. Noteworthy, 84 INTERPRETER RELEASES (No.33) 1986 (Aug. 27, 2007).

77. *ICE Discusses Delegation of Immigration Authority to State and Local Entities under the 287(g) Program*, 84 INTERPRETER RELEASES (No.38) 2273 (Oct. 1, 2007); U.S. Immigr. & Customs Enforcement, *supra* note 75.

78. Southern Poverty Law Ctr., New SPLC Report: Nation’s Most Prominent Anti-immigration Group has History of Hate, Extremism (Dec. 11, 2007), <http://www.splcenter.org/news/item.jsp?aid=295>.

79. Andrea Seabrook, *Latino Hate Crimes on the Rise, All Things Considered*, Nat’l Public Radio (Dec. 23, 2007), available at <http://www.npr.org/templates/story/story.php?storyID=17563862>.

80. Miller, *supra* note 12, at 616–17.

cuted, and sent to a prison in the United States.⁸¹ In those instances in which unauthorized border crossers are not criminally prosecuted, they are detained for longer periods of time before removal.⁸²

Fourth, undocumented aliens are punished, stigmatized, and excluded by symbolic politics and anti-immigrant campaign rhetoric that play upon the old stereotype of "immigrant criminality" and openly accuse undocumented immigrants as the cause of economic uncertainty and malaise. Despite the inherent complexity of economic cause and effect, and empirical evidence to the contrary, the claim that undocumented immigrants are to blame for America's economic woes has gained traction. Much like the rise of mass incarceration, politicians make a show of being "tough" on "illegal immigration."⁸³ For example, each debate among the 2008 presidential hopefuls sees the candidates trying to outperform the pack in their commitment to being "tough on illegal immigration."⁸⁴ Additionally, researchers have found that while Congress debated comprehensive immigration reform, politicians from districts with the least number of undocumented migrants were more likely to support HR 4437 (the toughest legislation regarding illegal immigration) than those from districts with substantial undocumented populations.⁸⁵

A. THE DOUBLE CRIMINALIZATION PROCESS

Undocumented immigrants from Mexico are doubly criminalized by neo-liberalism. The neo-liberal economic policies of NAFTA facilitated undocumented migration to the United States by spurring migration flows of poor, largely unskilled, and undocumented Mexicans across the border. First, they were criminalized when Reagan's neo-liberal reforms and the penal severity they fostered subjected a range of largely unskilled and poor dislocated Mexicans to the outcomes of a system that had abandoned the social welfare state and commenced to punish virtually every category of persons who once depended upon government-funded social support: vagrants, drug addicts, troubled youth, victims of extreme domestic violence and sexual abuse, and the mentally ill. Second, undocumented Latino migrants were criminalized by the response to the Mexican economic exodus, which was not comprehensive reform or increased forms of expedited removal, but categorization as a criminal and possible confinement in a United States prison.

81. *Id.* at 655; see also Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 *CRIMINOLOGY* 449 (1992).

82. See Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 *WASH. & LEE L. REV.* 469, 489-94 (2007).

83. See, e.g., Michael Cooper & Marc Santora, *Candidates Firm on Immigration*, N.Y. TIMES, Dec. 10, 2007, at A1; Sarah Wheaton, *Huckabee Immigration Plan Emphasizes Security*, N.Y. TIMES, Dec. 8, 2007, at A13.

84. See Cooper & Santora, *supra* note 83.

85. ROB PARAL AM. IMMIGR. L. FOUND., PLAYING POLITICS ON IMMIGRATION: CONGRESS FAVORS IMAGE OVER SUBSTANCE IN PASSING HR 4437 (Feb. 2006), http://www.aifl.org/ipc/policybrief/policybrief_2006_playingpolitics.shtml.

Thus, the characterization of Mexican and Central American youth who crossed the border illegally, with or without family members, and who live in blighted, post-industrial, drug-infested urban neighborhoods with poor schools and virtually no social supports as threats to public safety and national security oversimplifies a complex socio-economic cycle and overlooks the complicity of neo-liberal economic policies in creating a class of criminalized non-citizens.

B. IMMIGRATION DETENTION AND BORDER SECURITIZATION INDUSTRY

The relationship between neo-liberalism and the classification of undocumented immigrants as criminals may also be understood in terms of the economic benefit these policies confer upon the private sector. Heightened criminalization of undocumented migrants produces economic gains consistent with neo-liberalism's embrace of private ownership, deregulation, and individualism, because this new criminal population must be housed in large facilities or deterred from surreptitiously crossing the border by a fence spanning the large tracts of Texas, Arizona, and New Mexico.

Historically, the government's immigration removal and detention programs concentrated on deporting dangerous and criminal immigrants. However, with the passage in 1996 of both the Antiterrorism and Effective Death Penalty Act ("AEDPA")⁸⁶ and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"),⁸⁷ Congress codified the use of crime-related removal laws to facilitate national security measures targeting terrorism.⁸⁸ The passage of the USA PATRIOT Act in 2001⁸⁹ further connected crime-related removal and national security when it expanded terrorism-related grounds for deportation.⁹⁰ As I have pointed out in earlier scholarship, lawful permanent resident non-citizens with past criminal convictions in the United States and non-citizens who enter without inspection, are now thought of as uniformly dangerous and threatening to national security.⁹¹

Since the attacks of September 11, 2001, calls to secure the Southwest Border and to detain and remove all immigrants out of compliance with

86. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

87. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

88. Kathryn Harrigan Christian, Comment, *National Security and the Victims of Immigration Law: Crimes of Violence after Leocal v. Ashcroft*, 35 STETSON L. REV. 1001 (2006); Nora V. Demleimer, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism?*, 51 EMORY L.J. 1059 (2002).

89. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

90. Christian, *supra* note 88, at 1016-19.

91. Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005).

immigration law have been loud.⁹² The Secure Fence Act of 2006 dictates that the Department of Homeland Security must have operational control over U.S. borders within eighteen months as part of an effort to curb illegal immigration along the southern border.⁹³

Finally, indirect benefits to the private sector accrue from the symbolic politics of severity and exclusion of undocumented immigrants. By “symbolic politics,”⁹⁴ I am referring to the pronounced increase in anti-immigrant sentiment in cities and municipalities where undocumented migrants are only marginally represented. This sentiment is typically expressed in state legislation such as Proposition 187⁹⁴ (enacted into law by California voters in 1994), and municipal ordinances like the one recently passed in Hazelton, PA.⁹⁵ These ordinances are designed to stigmatize and exclude undocumented immigrants; they are the local government equivalent to posting an “Illegal aliens NOT welcome” sign at the town line. Through these symbolic political acts, disgruntled voters express a message that is consistent with neo-liberal economic ideology. They signal hostility toward undocumented immigrants and frustration with government,⁹⁶ most recently with the 109th Congress’s failure to pass federal immigration reforms. Undocumented immigrants are blamed for the community’s social ills—everything from traffic congestion to environmental concerns and the loss of middle class jobs. This in turn creates more insecurity and fear that masks the role of large corporations and neo-liberal economic ideology in creating these very circumstances.

IV. CONCLUSION

Consider the contrasting claims contained in two photographs I encountered on the internet; two among a bevy of media images related to undocumented immigration. Both photographs make a statement about Southwest Border crossing and crime. One is a photograph of a young Hispanic woman leaning out of the open window of a yellow bus. The bus looks as if it could be carrying immigration protesters to a rally, or transporting day laborers to a worksite. The young woman appears to be shouting while holding a white poster board sign that states: “I am an immigrant, not a criminal.”⁹⁷ The second photograph is of a beefy, grey-haired white male wearing a baseball cap, with his back to the camera. He is carrying a protest sign in his left hand that reads “23 million illegals in U.S.” and wearing a t-shirt, the back of which bears the following text,

92. See, e.g., Michael Chertoff, Sec’y of Homeland Sec., Remarks of Secretary of Homeland Security Michael Chertoff on September 11: Five Years Later (Sept. 8, 2006) (transcript online at http://www.dhs.gov/xnews/speeches/sp_115833578987.shtm).

93. Pub. L. No. 109-367, § 2, 120 Stat. 2638 (2006).

94. Proposition 187, 1994 Cal. Legis. Serv. Prop. 187 (West).

95. Hazelton, Pa., Ordinance 2006-10, *supra* note 7.

96. Kitty Calavita analyzed Proposition 187 as symbolic political speech directed at both the immigrant and the government. Kitty Calavita, *The New Politics of Immigration: “Balanced-Budget Conservatism” and the Symbolism of Proposition 187*, 43 Soc. PROBS. 284 (1996).

97. Appendix 1.

"What part of illegal don't they get?"⁹⁸

The first photograph challenges the notion that Hispanic immigrants, many of whom come to the United States across the Southwest Border, are inherently criminals. The disaffected young woman is tired of being negatively stereotyped and mis-categorized. She seems not only to be challenging her miscategorization as a "criminal"—her criminalization—but also positing the normative significance of the category of "immigrant."

In the other photograph, the white male protester pointedly asserts that illegal immigration is inherently criminal, ergo, undocumented immigrants are criminals. The man's impatience with undocumented border crossers who would classify themselves as "immigrants" or anything other than criminals is clear from the tone of the slogan printed on his t-shirt: "What part of ILLEGAL don't they get?" He has been inculcated into, and become the embodiment of the neo-liberal economic symbolic process: Learn to hate the undocumented population because they are all criminals who are stealing our jobs, ruining our communities, and jeopardizing the "American way of life." He represents the current furor over undocumented migration which opened this Essay.

The purpose of this Essay has been to take a preliminary look at the connections between neo-liberal economic policies and the criminalization of undocumented immigrants. I have attempted to show that globalization is not a new phenomenon, but that the neo-liberal globalization of the 1980 Reagan period is. It was an expansion internationally of policies that were already set in motion inside the United States: elimination of middle class and the polarization of the work force into highly skilled service-sector jobs and low wage unskilled labor. Mexico experienced the continental extension of these policies, with the result that millions of rural farmers were thrown off their lands. Thus, neo-liberal economic policies distorted life on both sides of the border: driving middle class jobs out of the United States while polarizing employment and luring unemployed Mexican workers into the United States with the promise of work in American agribusiness. Far from eliminating illegal immigration as promised, NAFTA in fact exacerbated these problems dramatically.

There are four ways in which neo-liberal economic policy contributed to the criminalization of undocumented migrants: by expanding the scope of criminal conduct related to undocumented migration; by increasing cooperation between immigration officials and law enforcement; by expanding the infrastructure of technologies used to punish crimes (for example fencing, incarceration, etc.); and by creating the public perception of the undocumented immigrant as the cause of economic malaise. Thus, an immigrant who enters the United States illegally is subjected to both the above criminalization and to a second kind of process already in place inside the United States: the neo-liberal economic framing of the

98. Appendix 2.

poor as undeserving and burdensome. The neo-liberal economic solution to vast numbers of criminalized undocumented migrants was to expand the industry of immigration detention, criminal incarceration, and border security. Building detention centers, prisons, and other facilities became the solution that provided both direct and indirect benefits to the private business sector. Finally, politicians and their corporate constituents who support these economic policies have been instrumental in promoting the vilification of undocumented workers as the actual cause of American problems.

With this Essay, I hope to begin a new type of conversation about the criminalization of undocumented immigrants, one that considers the larger picture of the economic policies that dictated U.S. policy over the last thirty years. The neo-liberal economic policies of the 1980s are arguably a strong but hidden causal agent in creating the current public outrage over undocumented migration.

APPENDIX 1



APPENDIX 2

